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Citation for published version (APA):

Blick, A., Howarth, D., & le Roux, N. (2014). *Distinguishing constitutional legislation: A modest proposal*. The Constitution Society. <http://www.consoc.org.uk/2014/08/distinguishing-constitutional-legislation-paper-online/>

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Distinguishing constitutional legislation

A modest proposal

Andrew Blick
David Howarth
Nat le Roux

THE
CONSTITUTION
SOCIETY



DISTINGUISHING CONSTITUTIONAL LEGISLATION

A MODEST PROPOSAL

Andrew Blick
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SOCIETY

First published in Great Britain in 2014 by
The Constitution Society
Top Floor, 61 Petty France
London SW1H 9EU
www.consoc.org.uk
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ISBN: 978-0-9928904-2-1

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Executive summary

- ◆ In most democratic states, the mechanisms for constitutional change are clearly separated from mechanisms for enacting other ('ordinary') legislation and are designed to make any significant alteration in existing constitutional arrangements a relatively difficult undertaking. In Britain there is no legislative process for constitutional change other than ordinary legislation, nor is there any clear or generally agreed distinction between constitutional and other laws. The potential shortcomings of this approach have become increasingly evident in the period since 1997. Constitutional modification is now an established part of every government's legislative programme. In this paper we address legislative means of changing the constitution.
- ◆ Most significant legislative changes to the constitution are contained in primary legislation. There is a convention that, after being introduced into Parliament, bills of 'first class constitutional importance' are referred in their committee stage, by the government's business managers, to a Committee of the Whole House rather than a public bill committee. Decisions as to whether a piece of legislation is of first class constitutional importance are not subject to any evident consistent underlying principle. They are made by the government which introduces the bill into Parliament; apparently subject to no parliamentary procedure for questioning such determinations; and, as proceedings in Parliament, they are not justiciable. It is not

clear that consideration by a Committee of the Whole House necessarily leads to more effective scrutiny.

- ◆ In *Thoburn v Sunderland City Council* (2002) Lord Justice Laws argued that the common law had in recent years come to recognise a new category of ‘constitutional statute’ which is not subject to implied repeal.
- ◆ There are principled arguments for distinguishing certain legislation as being of a fundamental or constitutional nature. The Constitution Society has argued that such a distinction should be made as part of legislative procedure. The government does not agree with this line of thinking. The government’s sole (principled) objection to the idea of special procedures for constitutional legislation appears to be the problem of definition. Therefore, early in 2012 the Constitution Society set up a working party of distinguished academics to attempt to find a definition of constitutional legislation which might command general acceptance.
- ◆ Examples of ways in which constitutional measures might be treated differently include: special procedures (pre-legislative, legislative or post-legislative), special restrictions on amendment / repeal, special interpretative techniques, ministerial statements, and prohibitions on waiving the requirement for consultation and pre-legislative scrutiny on grounds of alleged urgency and on introducing constitutional bills in the first term of a new Parliament.
- ◆ The passage into law of the Fixed-term Parliaments Act 2011 provides a valuable insight into the shortcomings of the current approach to major constitutional legislation. It demonstrates that the government may bring about substantial constitutional change at high speed, and with no meaningful prior consultation on the details, even

when such change lacks a clear electoral mandate, making the constitution subordinate to narrow party political considerations. This lack of a considered, inclusive process to constitutional change is undesirable from the point of view of principle. It prevents the thorough examination of the precise way such change is brought about, potentially harming its quality, and the wider constitutional environment at the time. There is a need for a mechanism which prevents the constitution from being subject to the political agenda of the government of the day and provides for proper consultation and scrutiny.

- ◆ The government's principled argument against special procedures for constitutional legislation rests on the problem of defining what should be subject to special treatment. There are at least three alternative approaches to the definition of constitutional legislation. The Commons Political and Constitutional Reform Committee has recommended that the government applies a test of whether the legislation in question affects a principle part of the constitution, and raises an important issue of principle, with reference to a list prepared by Professor Sir John Baker of constitutional subject matter.
- ◆ An alternative method of distinguishing constitutional legislation is certification. The practice in the United Kingdom Parliament of referring bills of first class constitutional importance to a Committee of the Whole House relies on a form of certification, but when viewed from this perspective, its shortcomings are evident.
- ◆ The modest proposal advanced in this paper is to abandon any attempt at an exhaustive definition of first class constitutional legislation, but instead to empower a committee in each House first, to determine whether a

bill contains provisions of constitutional significance and, secondly, to propose ways in which those provisions should be dealt with. The principal advantage of such a procedure would be its flexibility.

- ◆ Several existing committees might be considered suitable for this role but it might be best to establish new committees specifically for this purpose.
- ◆ The principal power any such committee would need would be a power to put down procedural motions and amendments concerning how the House deals with a bill. It might also be necessary to empower the committee to be able to force onto the agenda a motion to delay consideration of the second reading for a short period to allow it properly to consider a bill. Further, in order to allow a period of consultation on the principle of the bill itself, rather than merely on its detailed provisions, one might want the committee to have a power to put down and have debated a motion *before* second reading that there should be a public reading stage on a bill. The precise content of the committee's proposals should be a matter for the committee itself.
- ◆ One obvious objection to the proposal is that it would make no difference. In the Commons, the committee would reflect the political composition of the House and so would normally have a majority of government supporters; and would only be able to propose motions and amendments to the House. But the point should not be taken too far. Recent parliaments have seen a remarkable rise in backbench rebelliousness. The influence of a committee with the power to propose motions and amendments would be important. Even if a government feels that it has to reject the committee's recommendations and is able to fight off any rebellion, it would have been drawn into explicit and extensive debate on the issues.

- ◆ Another objection to establishing such a committee would be practicality: whether the committee would be able to do its job in time or whether undue delay might be caused for bills of no constitutional significance. But the objection is not a strong one. In relation to secondary legislation, the existing Secondary Legislation Scrutiny Committee already examines such legislation and could be asked to raise issues of constitutional significance. There is no reason in principle why private members' bills should be excluded from the committees' scope; but the relevant committee could have discretion to spend no time on bills with little chance of receiving a second reading.
- ◆ The remaining objection to the proposal is that it has no chance of being adopted by government because it involves giving power away. Governments rarely support reforms of this kind. However, the means now exist for effecting such a change without the government's support: the Backbench Business Committee. All that is really required is sufficient political will from members themselves.

Distinguishing constitutional legislation: a modest proposal

Introduction

1. In most democratic states, the mechanisms for constitutional change are clearly separated from mechanisms for enacting other ('ordinary') legislation and are designed to make any significant alteration in existing constitutional arrangements a relatively difficult undertaking. The pervasiveness of these provisions is not accidental. The legitimacy of a democratic political system rests on a generally held belief that all political interests must play by a consistent set of rules which are generally regarded as fair and cannot be easily manipulated for political advantage. In most democracies constitutional changes are made infrequently, and only when there is a broad consensus, normally extending beyond the government of the day, that the existing arrangements are significantly defective.
2. In Britain there is no legislative process for constitutional change other than ordinary legislation, nor is there any clear or generally agreed distinction between constitutional and other laws. The potential shortcomings of this approach have become increasingly evident in the period since 1997 which has been marked by frequent, sometimes hectic, constitutional change. The Blair government undertook an extensive programme of piecemeal constitutional reform,

intended in part to demonstrate its modernising credentials and bolster popular confidence in the political system generally. Since 2010, the Coalition government has also pursued a busy programme of constitutional legislation, much of it arguably intended mainly to cement the political bargain between the Coalition partners.

3. Constitutional modification, whether it is seen as well-intentioned and considered reform or self-serving or idle tinkering, is now an established part of every government's legislative programme. There is no reason to believe that future governments will break the habit. Constitutional horse-trading of the type embodied in the 2010 Coalition Agreement may become a regular feature of future coalition governments. A report of the House of Lords Select Committee on the Constitution in 2011 summarised the current situation in these terms:

There are a number of weaknesses inherent in the current practice of legislating for constitutional change: lack of constraints on the government, failure to have regard to the wider constitutional settlement, lack of coherence within government, lack of consistency in the application of different processes, changes being rushed and lack of consultation. These weaknesses arise out of the fact that the United Kingdom has no agreed process for significant constitutional change.¹

4. However both Parliament and the courts have, in specific contexts, recognised a distinction between 'constitutional' and 'ordinary' legislation.

¹ 15th Report, July 2011, *The Process of Constitutional Change*, para 51.

5. In this paper we address legislative means of changing the constitution, though we acknowledge that the constitution may be altered through changes of practice or in convention, often dictated by the government of the day.

Parliamentary process

6. Most significant legislative changes to the constitution are contained in Acts of Parliament; primary legislation. However constitutional changes can also be introduced through subordinate legislation issued under the power of a parent Act. Such legislation may in some circumstances amend or repeal primary legislation.
7. In the case of primary legislation, there is a convention that, after being introduced into Parliament, bills of 'first class constitutional importance' are referred in their committee stage to a Committee of the Whole House rather than a public bill committee.² The decision to refer bills in this way is made by the government's business managers. In 2006 Professor Robert Hazell at the UCL Constitution Unit examined bills introduced in the eight years after the 1997 election and concluded that there was no evident consistent principle underlying these decisions.³ There is no reason to believe that things have changed much since then. The decision as to whether a piece of legislation is of first class constitutional importance is made by the government which introduces the bill into Parliament. There appears to be no parliamentary procedure for questioning these

2 *Erskine May: Parliamentary Practice* (24th edition: Butterworths, 2011), p 555.

3 Hazell R, *Time for a new Convention: Parliamentary Scrutiny of Constitutional Bills 1997–2005*, Public Law, Summer 2006, from p247.

determinations and, as proceedings in Parliament, they are not justiciable. A 2013 report of the House of Commons Political and Constitutional Reform Committee ('PCRC') concluded that:

The current ad hoc process of identifying which bills to take on the Floor of the House of Commons in a Committee of the whole House lacks transparency: it is clear that differentiation is taking place in order to decide which bills are to be considered by a Committee of the whole House, but the decision-making process is unclear.⁴

8. It is not clear that consideration by a Committee of the Whole House necessarily results in more effective scrutiny of bills of first class constitutional importance. While all Members have an opportunity to participate in the committee stage, the extent of the debate will often be constrained by timetable considerations.
9. Subordinate legislation, contained in statutory instruments, is subject to a lower level of parliamentary control or scrutiny than primary legislation. No specific mechanism exists for marking out subordinate legislation as requiring special treatment on constitutional grounds. However, the system of committees in both Houses does allow for statutory instruments to be brought to the attention of Parliament, and for consideration of their merits, allowing for the possibility of consideration of constitutional issues. There is also provision for scrutiny of European legislation, which may in some cases also be of arguable constitutional significance.

⁴ PCRC, First Report of Session 2013–14, May 2013, *Ensuring standards in the quality of legislation*, para 142.

The Thoburn case

10. In *Thoburn v Sunderland City Council* (2002)⁵ (the ‘Metric Martyrs’ case) Lord Justice Laws remarked that the common law had in recent years come to recognise a new category of legal provision which is not subject to implied repeal:

In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental [...] And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were “ordinary” statutes and “constitutional” statutes. The two categories must be distinguished on a principled basis.

Laws L.J.’s statement was *obiter*: subsequent judgments have neither amplified nor disavowed his remarks, but they could point to a gradual and wider shift of attitudes within the judiciary.

Why are constitutional laws different?

11. In states with codified constitutions the distinction between constitutional and general legislation is explicit: whatever is provided for in the constitution is constitutional. In the absence of a constitutional document there are nonetheless principled arguments for distinguishing certain legislation as being of a fundamental or constitutional nature.
12. Public acceptance of legitimate authority rests on a belief in the existence of an overarching body of rules which frame the political arena. If elected governments too often seem to amend

5 [2003] QB 151.

these rules in a self-interested way then trust in the legitimacy of the political system may be progressively undermined.

In Sir Jeffrey Jowell's words:⁶

... the constitution provides the rules of the game, the framework for all official decisions. If these decisions are to be accepted as legitimate, even though you may not agree with them, then the framework of decision-making must command respect and general acquiescence.

13. In evidence to PCRC's recent inquiry into legislative standards, The Constitution Society argued that a category of legislation should be distinguished as constitutional on three grounds:⁷

- ◆ Constitutional legislation is the architecture of the state. The elements of the constitution are unavoidably interconnected, so an alteration in one part of the 'building' can have unforeseen consequences in other parts.
- ◆ Most major constitutional legislation has an effective presumption of irreversibility.
- ◆ A practice has arisen under the current government of incorporating provisions in constitutional legislation which impose restrictions on future Parliaments.⁸

6 House of Lords Constitution Committee, 15th Report, July 2011, *The Process of Constitutional Change*, para 52.

7 First Report of Session 2013–14, May 2013, *Ensuring standards in the quality of legislation*, para 135.

8 There are two examples: the 'referendum locks' in the European Union Act 2011 and the supermajority provision in section 2 of the Fixed-term Parliaments Act 2011.

14. The government does not agree with this line of thinking, arguing in the conclusion to its response to the 2011 Lords Constitution Committee report:

It is intrinsic in the United Kingdom's constitutional arrangements that we do not have special procedures for dealing with constitutional reform. Comparing processes in the United Kingdom with those in other countries which do have written constitutions and special procedures for reform of those constitutions is therefore of limited value. The first stumbling point, as the Committee has itself noted, is the problem of the definition of what should be subject to special treatment.⁹

As the response does not enumerate further stumbling points, we may conclude that the government's sole, or at least sole principled objection to the idea of special procedures for constitutional legislation is the problem of definition.

The government reiterated these views in July 2013 in its response to PCRC's report on legislative standards:

The Government does not accept that it would be helpful to seek to define "constitutional" legislation, nor that it should automatically be subject to a different standard of scrutiny.¹⁰

The Government does not agree with the Committee's assertion that "constitutional law is qualitatively

⁹ The Government Response to the House of Lords Constitution Committee Report, *The Process of Constitutional Change*, September 2011, para 27.

¹⁰ The Government Response to the House of Commons Political and Constitutional Reform Committee Report, *Ensuring standards in the quality of legislation*, para 58.

different from other types of legislation". Constitutional legislation, like all legislation, varies in its importance, complexity and impact ... Current legislative processes provide sufficient flexibility to allow an assessment to be made on the bill in question and the Government to propose the appropriate method and level of scrutiny.¹¹

15. In early 2012 The Constitution Society set up a working party of distinguished academics¹² to attempt to find a definition of constitutional legislation which might command general acceptance. The problem of definition is discussed at paragraphs 24–30 below.

How might constitutional measures be treated differently?

16. The Society's working party has identified the respects in which a category of constitutional law might in principle be subject to special treatment:

Six possible (but not exhaustive) reasons for wanting to establish a special category of constitutional legislation would be (i) deciding what sorts of measures require a special pre-legislative procedure, (ii) deciding what sorts of measures require a special legislative procedure, (iii) deciding what sorts of measures require a special post-legislative procedure, (iv) deciding what sorts of measures require special restrictions on subsequent amendment and/or repeal, (v) deciding what sorts of measures should be subject to special interpretative techniques, and (vi) deciding what sorts of measures should give rise to

¹¹ *Ibid.*, para 60.

¹² The members of the working party are: Prof Sir John Baker, Dr Andrew Blick, Prof Linda Colley, Prof David Feldman, Richard Gordon QC, Mr David Howarth (Chair), Nat le Roux, Lord MacLennan of Rogart.

*special interpretative techniques being imposed on other legislation. We suggest that the boundary-line between constitutional and other legislation might be drawn in different places according to the purpose for which one is seeking to make the distinction.*¹³

17. In its 2011 Report, the Lords Constitution Committee¹⁴ recommended that the minister responsible for introducing a bill in either House should make a written ministerial statement setting out whether, in the minister's view, the bill provides for significant constitutional change and, if so:

- ◆ *what is the impact of the proposals upon the existing constitutional arrangements;*
- ◆ *whether and, if so, how the government engaged with the public in the initial development of the policy proposals and what was the outcome of that public engagement;*
- ◆ *in what way were the detailed policies contained in the bill subjected to rigorous scrutiny in the Cabinet committee system;*
- ◆ *whether a green paper was published, what consultation took place on the proposals, including with the devolved institutions, and the extent to which the government agree or disagree with the responses given;*
- ◆ *whether a white paper was published and whether pre-legislative scrutiny was undertaken and the extent to which the government agree or disagree with the outcome of that process;*

13 Feldman D and Howarth D, internal paper, 2013.

14 House of Lords Select Committee on the Constitution, 15th Report, July 2011, *The Process of Constitutional Change*, paras 71–72.

- ◆ *what is the justification for any referendum held, or to be held, on the proposals;*
- ◆ *and when and how the legislation, if passed, will be subject to post-legislative scrutiny.*

18. The Constitution Society has argued¹⁵ that enhanced legislative standards should be applied to constitutional bills and in particular that the requirement for consultation and pre-legislative scrutiny should not be waived on grounds of alleged urgency if a bill is constitutional. It might similarly be argued that constitutional bills should not be introduced in the first term of a new Parliament, especially if the proposed legislation was not foreshadowed in the government's election manifesto.
19. The passage into law of the Fixed-term Parliaments Act 2011 provides a valuable insight into the shortcomings of the current approach to major constitutional legislation.

Case study: the Fixed-term Parliaments Act 2011

Content and constitutional significance of the Act

20. The Fixed-term Parliaments Act 2011 created a regular timetable for general elections to take place every five years, on the first Thursday in May. Previously, within a five-year limit, prime ministers were able to request a dissolution from the monarch under the Royal Prerogative. They were thereby able to determine the timing of the General

¹⁵ le Roux N, June 2012, oral evidence to PCRC inquiry into *Ensuring standards in the quality of legislation*.

Election, subject to a broad convention that the power should not be abused. The new arrangements established by the Act provided for early dissolutions in two circumstances. The first trigger was two thirds of MPs in the Commons (including vacant seats) voting for a General Election. The second occurred if the Commons passed – on a simple majority – a motion of no confidence in a government, and a new government could not win a confidence vote within 14 days.

21. The Act was of the highest constitutional significance for a number of reasons:

- ◆ The subject matter of the Act, involving the duration of the elected component of the UK legislature and the means by which it may be dissolved, was of first order importance. In a country which possessed a written constitution, the document would surely deal with this issue, and any changes to the arrangements involved would be subject to whatever amendment procedures the constitution itself prescribed;
- ◆ The Act effected an important formal constitutional change. It transferred the power to dissolve Parliament in advance of the five-year maximum term-length from a Royal Prerogative to a statutory basis (s.3 [2]);
- ◆ The Act brought about another significant formal constitutional change through creating a statutory basis for the Commons to express its confidence or lack thereof in the government of the day. It also specified that the loss of a

confidence vote would lead to an early General Election, unless a government was able to win a confidence vote within a 14 day time-limit (s.3 [3–5]) Previously processes surrounding confidence votes existed on a basis of convention;

- ◆ The Act potentially engaged the absolute veto of the House of Lords, one of the closest equivalents to a constitutional amendment procedure in the UK. Under the Act prime ministers could, by order, move the date of the General Election up to two months beyond the regular five-year limit it created (s.1 [5]). Consequently when passing through Parliament as a Bill it was exempt from the restrictions on the powers of the House of Lords contained in the Parliament Act.¹⁶ Previous changes engaging the residual Lords legislative veto since the passing of the Parliament Act in 1911 involved temporary extensions of Parliament during the emergency circumstances of world war; and received all-party support. On this occasion, the measure – though it would not inevitably lead to parliaments of longer than five years, and then only by a maximum of two months – was permanent. It did not address an emergency, and did not command the consensus that the wartime extensions of the length of Parliament had.

16 See Parliament Act 1911 s.2(1).

- ◆ The Act had consequences for the electoral timetable of different tiers of government, leading to delays by a year in the forthcoming elections to the Scottish Parliament and Welsh Assembly (ss.4–5), to avoid their coincidence with a UK General Election;
- ◆ The Act introduced a novel procedure for a supermajority in the House of Commons as a means of triggering an early General Election (s.2 [1], [2]);
- ◆ The Act dealt with a subject in which reformers had been interested for a number of years, arguing that there were grounds for democratic improvement. A number of those who agreed with the broad principle of fixed-term parliaments objected to particular components of the Act, including the setting of the length of a Parliament at five years, which many saw as excessively long.

Genesis and scrutiny of the Act

22. The Liberal Democrat manifesto of 2010 pledged to introduce ‘fixed-parliaments to ensure that the Prime Minister of the day cannot change the date of an election to suit themselves’.¹⁷ The Conservative Party however was not committed to this policy and during the previous parliament a Labour minister had talked out a private

¹⁷ *Liberal Democrat Manifesto 2010* (Liberal Democrat Party: London, 2010), p88.

member's bill proposing a version of it.¹⁸ Consequently, in as far as the electoral mandate is regarded as a means of legitimising constitutional reform proposals, it is difficult to use in support of the manner in which this Act passed into law.

The Fixed-term Parliaments Act 2011 arose from the negotiations between the Conservatives and Liberal Democrats that followed the inconclusive General Election of May 2010 and led to the formation of the Coalition government. In *The Coalition: our programme for government*, the new government committed to establish 'five year fixed-term Parliaments', but with provision for earlier dissolution subject to the support of at least 55 per cent of the Commons, equal to the combined strength of the two Coalition parties.¹⁹ After protests the 55 per cent was increased to two thirds.

23. The Act was, therefore, driven by the political imperatives of the Coalition, which regarded its implementation as urgent. Indeed without it, the Coalition might have been highly unstable in its early stages and might have failed entirely. The pace with which it passed into law was itself of very great political importance since the bill was a crucial confidence building measure, without which the junior partner might have interpreted every occasion on which the senior partner made difficulties as a prelude

18 HC Deb, 16 May 2008, col 1703 at col 1719. One of the authors declares his interest as the sponsor of that bill. He still maintains that his bill, which provided for no way of cutting short a parliament except by passing a repealing or amending statute, was superior to that passed in 2011.

19 *The Coalition: our programme for government* (HM Government: London, 2011), p26.

to engineering a crisis and calling a General Election. But the process by which it passed into law was a subject of criticism. There was no green or white paper, and no meaningful pre-legislative scrutiny. The House of Commons Political and Constitutional Reform Committee complained that the Bill was ‘ill-thought through’ and ‘rushed’.²⁰ The Committee argued that ideally the Bill would command ‘political consensus’. Although there was a genuine political urgency behind the proposal, it was certainly possible for the government to have proposed the reform in two parts; an urgent Bill that applied only to the current parliament, which would have had the desired political effect, and a second Bill making the change permanent, which could indeed have been preceded by a draft Bill or other forms of wider consultation. The House of Lords Select Committee on the Constitution complained that the

*speed with which the policy was introduced, with no significant consultation, no green paper and no detailed assessment of the pros and cons of a five year term over a four year term, suggests that short-term considerations were the drivers behind the Bill's introduction.*²¹

24. Beyond the most common complaint about the five year term, both committees and other observers highlighted possible concerns about the design of the Bill, that could perhaps have been addressed better at a consultation or full pre-legislative stage. The issues raised included a lack of clarity around the confidence vote concept, and the danger

20 House of Commons Political and Constitutional Reform Committee, *Fixed-term Parliaments Bill*, HC 436 2010–11 (Stationery Office: London, 2010), p5.

21 House of Lords Select Committee on the Constitution, *Fixed-term Parliaments Bill*, HL 69 2010–11 (Stationery Office: London, 2010), p9.

that the provision for early elections could be abused for partisan ends.

Conclusion

25. A number of conclusions can be drawn from this case study.

First, it is possible for the government of the day to bring about substantial constitutional change at high speed, and with no meaningful prior consultation on the details, even when such change lacks a clear electoral mandate. The Fixed-term Parliaments Act 2011 was by any standard of major constitutional significance on a number of grounds. Parliamentary committees judged it to be an important piece of constitutional legislation, and expressed regret at the haste with which it was implemented.

Second, the potential for legislating in this way may make the constitution subordinate to narrow party political considerations. The key drivers in this case were the requirements of the Coalition agreement and the parties to it.

Third, this lack of a considered, inclusive process is undesirable from the point of view of principle.

Fourth, this approach to constitutional change prevents the thorough examination of the precise way it is brought about, including by those who are generally supportive of the measure, potentially harming its quality. The Fixed-term Parliament Act 2011 might have been better designed if a different approach had been taken.

Fifth, such legislation can be introduced without regard to the wider constitutional environment within which it

operates, for instance the connection between this Act and the House of Lords reform then being contemplated.

Sixth, the availability of a House of Lords veto – a ‘nuclear option’ always unlikely to be deployed anyway – was not a substitute for meaningful consideration of the principles and their realisation, and does not compensate for these problems.

26. The experience of the Fixed-term Parliaments Act 2011 suggests a need for a mechanism which:

- ◆ Prevents the constitution from being subject to the political agenda of the government of the day;
- ◆ Creates a strong incentive for a government to consider the constitutional significance of proposals before it announces them, and allow for suitable consultation and scrutiny procedures;
- ◆ Encourages the government to publish an assessment of the full constitutional impact of its constitutional proposals and how it intends to ensure appropriate consultation and scrutiny takes place;
- ◆ Enables Parliament, when it believes the government is not facilitating appropriate consultation and scrutiny, to classify a bill as of substantial constitutional significance, and trigger a mechanism of its own;
- ◆ Provides that acknowledgement by the government or assertion by Parliament that an

Act was of special constitutional significance might subsequently be taken into account by the courts, particularly in assessments of whether the Act was subject to implied repeal by a later Act of Parliament.

Distinguishing constitutional laws – the definitional approach

27. The government's principled argument against special procedures for constitutional legislation rests on the '*problem of the definition of what should be subject to special treatment*'.²² Two separate questions arise; first, is the difficulty of establishing a determinative definition of constitutional legislation insuperable and, second, if such a definition cannot be found, does it follow that constitutional bills cannot be identified and, if Parliament so decides, made subject to special legislative procedures?
28. There are at least three alternative approaches to the definition of constitutional legislation. One approach is to produce a list or catalogue of constitutional subjects. Legislation which touches on any of this subject matter is defined as constitutional. Professor Sir John Baker has proposed the following list of constitutional subject matter which has been cited with approval by both the Lords Constitution Committee and PCRC in recent reports:²³

22 The Government Response to the House of Lords Constitution Committee Report, *The Process of Constitutional Change*, September 2011, Cm 8181, para 27.

23 House of Lords Constitution Committee 15th Report, July 2011, *The Process of Constitutional Change*, para 11; First Report of Session 2013–14, May 2013, *Ensuring standards in the quality of legislation*, para 139.

- ◆ *any alteration to the structure and composition of Parliament;*
- ◆ *any alteration to the powers of Parliament, or any transfer of power, as by devolution or international treaty, which would in practice be difficult to reverse;*
- ◆ *any alteration to the succession to the Crown or the functions of the monarch;*
- ◆ *any substantial alteration to the balance of power between Parliament and government, including the conferment of unduly broad or ill-defined powers to legislate by order;*
- ◆ *any substantial alteration to the balance of power between central government and local authorities;*
- ◆ *any substantial alteration to the establishment and jurisdiction of the courts of law, including any measure that would place the exercise of power beyond the purview of the courts, or which would affect the independence of the judiciary;*
- ◆ *any substantial alteration to the establishment of the Church of England;*
- ◆ *any substantial alteration to the liberties of the subject, including the right to habeas corpus and trial by jury.²⁴*

24 A list of current statutes which satisfy Sir John's definition appears in the Appendix to this paper.

29. A difficulty with any list of this kind is that it will inevitably seem to many people to be either over- or under- inclusive. There are also obvious difficulties in the interpretation of terms such as 'substantial', which must be to some degree subjective. We may conclude that a list of constitutional subject matter may provide valuable guidance but cannot in itself put the question of whether or not a particular piece of legislation is constitutional beyond reasonable argument and thus cannot be employed in isolation as a determinative method.
30. A list of major constitutional *statutes* is likely to command more general consensus. However a list of statutes is of limited value in determining whether new legislation is constitutional when that legislation may not necessarily seek to amend any existing constitutional statute.
31. In his judgment in *Thoburn*, Laws L.J. proposed a definition of constitutional statutes, supported by a short list of examples:

In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998. The ECA clearly belongs in this family.

It is clear that the distinguished judge did not intend this to be a comprehensive list of constitutional statutes. In the Appendix to this paper, the Constitution Society working party has attempted to compile a list of all current statutes which are of first class constitutional importance. While there may be room for debate at the periphery, it is suggested that this list would command fairly general assent.

32. An alternative approach is to apply a very general and cryptic definition of constitutional subject matter. Professor David Feldman has suggested this approach to the Constitution Society working party:

*... a constitution's basic task is to constitute the state by creating state institutions and allocating functions to each institution. Constitutions are essentially institutional. Constitutional legislation, therefore, is legislation which establishes or shapes an institution of the state.*²⁵

33. A formulation of this kind may seem uncontroversial but at the same time provide insufficient guidance on the constitutional nature of specific legislation. For example, should the voting system (a sub-constitutional matter in many democracies with codified constitutions) be viewed as constitutional under a definition of this type? And what of individual rights, which may not necessarily be connected with the functioning of state institutions?
34. Lastly, there is what may be described as the common-sense approach. Lord Norton of Louth has proposed a "2Ps" test for constitutional legislation: does it affect a *principal* part of the constitution, and does it raise an important issue of

25 Internal paper, 2013.

principle. PCRC's recent report on legislative standards recommends that the government applies Lord Norton's "2Ps" test in conjunction with Sir John Baker's list of constitutional matters, when deciding which bills to take to a Committee of the Whole House.²⁶

Distinguishing constitutional laws – certification

35. An alternative method of distinguishing constitutional legislation is certification. Under a certificatory approach, major constitutional legislation is that which is held to be so by a certifying authority. A process of certification avoids interpretational difficulties but may by its nature appear arbitrary. It requires a certifying authority which is generally accepted as authoritative and which seeks to apply known interpretative principles in a consistent way.
36. In a recent paper²⁷ Professor David Feldman has described the approach to distinguishing major constitutional legislation which has evolved in Israel, one of the very small number of democratic states lacking a codified constitution:

... successive Knessetim have made what they called 'Basic Laws'. These are in effect constitutional laws which cumulatively contribute to the construction of a constitution for the State. Basic Laws have been passed by the ordinary legislative procedure and by ordinary parliamentary majorities. There was doubt about the status of Basic Laws relative to other laws in the State's

26 First Report of Session 2013–14, May 2013, *Ensuring standards in the quality of legislation*, para 142.

27 Feldman D, *The nature and significance of "constitutional" legislation*, paper presented at The Society of Legal Scholars' Conference, September 2012.

normative hierarchy. In due course the Supreme Court of Israel held that Basic Laws have higher, constitutional status, and that ordinary laws are invalid if incompatible with them. The Court decided that, when passing a Basic Law, the Knesset exercises its original function as a constituent body for the State of Israel, and as such its legislation has higher normative status than Laws which it makes in its ordinary, legislative capacity. Laws made in the exercise of the constituent power of the Knesset are identifiable by their titles; if a law is called a Basic Law, it is a Basic Law, regardless of its content or effects.

37. The practice in the United Kingdom Parliament of referring bills of first class constitutional importance to a Committee of the Whole House relies on a form of certification. When viewed from this perspective, the shortcomings of the current approach are evident:
- ◆ The certification of constitutional bills rests solely with the government; Parliament as a whole has no opportunity to debate or endorse the government's certificatory decisions.
 - ◆ The basis on which certificatory decisions are made by government is not based on any evident or consistent set of principles.
 - ◆ There is no procedure for certifying secondary legislation which has constitutional effects.
 - ◆ The fact that a bill was certified by government to be of first class constitutional importance is not evident on the face of the subsequent Act. In consequence, if the courts come to take the view, following *Thoburn*, that special principles of interpretation should be applied

to constitutional legislation, judges are left to decide for themselves whether or not a particular statute is constitutional, without guidance from Parliament.

A modest proposal

38. Is there a method of distinguishing legislation of first class constitutional importance which could be applied by Parliament using existing procedures? Furthermore, are there existing procedures which would allow Parliament, if it so decided, to apply special legislative processes to such legislation, including subordinate legislation (other than the existing convention of referral to a Committee of the Whole House)?
39. One way forward would be to abandon any attempt at an exhaustive definition of first class constitutional legislation, along with any attempt to enshrine any such definition in a statute binding on the world outside the legislature, but instead to empower a committee in each House, first, to determine whether a bill contained provisions of constitutional significance and, second, to propose ways in which those provisions should be dealt with. Although such an approach might to begin with operate without a determinate set of principles, the mere fact that, unlike the current system, it would cause a public record to be created, would itself be an improvement, and might eventually lead to a form of 'case law' out of which principles might emerge. Furthermore, it could be applied to secondary legislation, at least if sufficient resources were devoted to the process. And although the face of the Bill would not include a

statement that the committee had classified a proposal as constitutionally significant, it might be possible later to develop, perhaps by statute, a process under which, just as a Secretary of State has to certify that a bill does not infringe human rights,²⁸ the committee has to certify that a bill does or does not have constitutional significance.

40. The principal advantage of such a procedure would be its flexibility. The fact that there are different kinds of 'constitutional' proposal of different degrees of importance and difficulty could be taken into account in the way the committee might propose that they be handled. The committee would not be limited to the existing procedure of committing the bill to a Committee of the Whole House but would have a range of possible procedures from which to choose.

Which committee?

41. A number of reasonable options exist for resolving the issue of which committee should be assigned the task of deciding whether provisions of a bill have constitutional significance and what modifications should be made in the way they are handled. Several existing committees might be considered suitable but it might be best to establish new committees specifically for this purpose.
42. One option would be to use PCRC in the Commons and the Constitution Committee in the Lords. These committees have the advantage of existing expertise. The objection might be raised, however, that departmental or thematic

28 Human Rights Act 1998, s.19.

select committees do their best work when they operate on a cross-party, less partisan basis, so that inserting an element of regular potentially contentious business into their schedules might bring with it a danger of undermining their working style. Another option from among existing bodies is the Commons Procedure Committee, also expert in a relevant field, albeit also arguably better left uncontaminated by regular contentious business.

43. A different option for the Commons would be the Backbench Business Committee, whose principal task is the allocation of backbench time in the House and in Westminster Hall. The Backbench Business Committee is certainly accustomed to contentious business – applications for backbench debates regularly exceed the available time – and it is increasingly adroit in its use of procedure. The objection to using it for the present purpose, however, would be that its principal responsibility is to backbenchers and that assigning it a general constitutional task would be a diversion.
44. A third option would be the Joint Committee on Human Rights, which reports to both Houses on the human rights implications of all bills. It has the considerable advantage of being used to working with great rapidity on new bills and its expertise is certainly relevant, albeit narrower than the full range of possible constitutional issues. There are, however, two objections to its use: first, precisely because it currently examines every bill, its workload is very heavy and adding to it might not be advisable; and second it is a joint committee of both Houses, so that some would complain about members of the unelected House having influence over proceedings in the elected House.

45. Other options exist. The Committee of Privileges, for example, has some relevant expertise and is accustomed to contention, though perhaps in neither case of exactly the right kind. One might also consider the Committee of Selection, the committee which controls the membership of general committees including bill committees, and so is familiar with the right part of parliamentary procedure. At the moment, however, it suffers from the grave defect that it is not elected by the House but rather nominated by the Whips, who often nominate themselves. In the Lords, one might propose using the Delegated Powers and Regulatory Reform Committee, which already looks at bills for constitutional implications.
46. It might be best, however, to create committees specifically for the task. In the Commons the committee would be elected according to the existing procedures for select committees, namely that the chair would be elected by the whole House and the membership for each party elected by democratic internal procedures.²⁹

What powers should the committee have?

47. The principal power any such committee would need would be a power to put down procedural motions and amendments concerning how the House deals with a bill. In the current procedure in the Commons, the almost invariable practice is to take such motions immediately after second reading, so that the committee would have to complete its work between the publication of a bill (which for a government

29 SO 122B and resolution of 4 March 2010 (HC Deb, 3 March 2010, col 1095).

bill usually coincides with first reading) and the day before second reading. That is a tight timetable, although by no means impossible for a committee charged with no other business. It might, however, be necessary to empower the committee not only to put down but also to be able to force onto the agenda a motion to delay consideration of the second reading for a short period to allow it properly to consider a bill.

48. A related problem with the existing procedure is that because procedural handling is decided after second reading, the House has already decided that it is in favour of the principle of a bill before deciding how further to debate it. It might instead be thought desirable for there to be a period of consultation on the principle of the bill itself, rather than merely on its detailed provisions. The Coalition Agreement itself proposed that such a 'public reading stage' might be included in the procedure for ordinary bills,³⁰ and so the case for its inclusion in constitutionally significant bills might be thought even stronger. Admittedly, in the few bills in which the government has inserted such a stage it was not completed in time for the second reading debate and the government asserted that the procedure was designed to allow public comments to influence the committee and report stage debates only.³¹ But one might argue that the bills themselves, especially the Protection of Freedom Bill 2011, consisted of a list of very specific proposals and did not lend themselves to a consultation

30 *The Coalition: our programme for government* (HM Government: London, 2011), para 27.

31 House of Commons Library, *Public Reading Stage of Bills*, SN/PC/06406, 22 August 2012, p7.

about overall principle. As a result, one might also want the committee charged with considering the constitutional significance of bills to have a power to put down and have debated a motion *before* second reading that there should be a public reading stage on a bill.

49. The precise content of the committee's proposals should be a matter for the committee itself. It would want to consider, for example, whether there should be public hearings on a bill, whether after such hearings the bill should be considered by a Committee of the Whole House or by a public bill committee (or divided between the two, as already happens for many bills, especially Finance Bills) and whether there was sufficient time for the bill to be debated properly. The committee might also propose that no further proceedings on the bill should take place until the government published a white paper setting out the objectives of the proposal and its constitutional impact.

Would it make any difference?

50. One obvious objection to the proposal is that it would make no difference. In the Commons, the committee, in line with standard practice, would reflect the political composition of the House and so would normally have a majority of government supporters. Moreover, the committee would only be able to propose motions and amendments to the House. The House would decide whether to adopt them and, again in normal circumstances, the government would have a majority. Such is the nature of parliamentary democracy.
51. The point should not, however, be taken too far. Recent parliaments have seen a remarkable rise in backbench

rebelliousness.³² The days of almost military discipline, which characterised the post-war years, have entirely gone. Some try to explain the rise of rebellion by pointing to a renewed sensitivity of MPs to the views of constituents and to social media, but that would not explain, for example, the enormous Conservative revolt on House of Lords reform, which seems to have been entirely self-started. That revolt is particularly significant not just because it was on a constitutional issue but also because it threatened the vital interests of the Conservative Party by prompting the Liberal Democrats to withdraw support for boundary changes that would have put the Conservatives in a much stronger position to win the 2015 election. The Conservative leadership seems to have lost control of its party on precisely the kind of issue that the party whip is supposed to deliver.

52. Moreover, the mere possibility or threat of revolt is often a potent political force in itself, leading governments to alter course in anticipation of problems. As a result the influence of a committee with the power to propose motions and amendments might well be invisible to the naked eye but it would nonetheless be important.
53. Finally, even if a government feels that it has to reject the committee's recommendations and is able to fight off any rebellion without making concessions, it would have been drawn into explicit and extensive debate on the issues, the content of which might be useful on other occasions and in the House of Lords, where the government has no majority.

32 See eg Cowley P and Stuart M, *Parliament still remains on course to be the most rebellious since 1945*, Political Insight, 14 May 2013, <http://www.psa.ac.uk/political-insight/blog/parliament-still-remains-course-be-most-rebellious-1945>.

Practicality

54. Another objection to establishing such a committee would be practicality. There is the issue of whether the committee would be able to do its job in time (or, alternatively, an issue of whether undue delay might be caused for bills of no constitutional significance). The objection, however, is not a strong one. Most bills have no constitutional significance at all and could be dealt with rapidly, and in the case of bills with constitutional significance, the question is not one of the substance of the proposals but merely how they are dealt with procedurally.
55. A problem might arise, however, if secondary legislation is brought into the picture. Hundreds, or even thousands, of such measures are proposed every year, and the job of checking each one for constitutional implications would be immense. One possible way of dealing with the problem, however, might be to use an existing Lords committee, previously the Committee on the Merits of Statutory Instruments, now called the Secondary Legislation Scrutiny Committee, which already examines secondary legislation, and ask it to bring to the attention of the Commons and Lords committees on constitutional significance any measures it considers worthy of their attention.
56. A final point concerns private members bills. There is no reason in principle why private member's bills should be excluded from the committees' scope – it is, for example, quite astonishing that a bill to hold a referendum on a matter of vast constitutional importance such as membership of the European Union can make its way through the Commons on the same basis as the Margaret Thatcher Day Bill. But

there is a practical problem. Although the procedures of the Commons mean that the committee will have plenty of notice of the second readings of private member's bills, there is a potential difficulty that since there is in principle no limit to the number of private member's bills that can be put down, the committee might be swamped by proposals that have no chance of being passed. The practical way out of the problem is to ensure that the committee has discretion to spend no time on bills with little chance of receiving a second reading.

Political will

57. The remaining objection to the proposal is simply that it has no chance of being adopted by government, for the straightforward reason that it involves giving power away. It is no doubt true that governments rarely support reforms of this kind, even more rarely later than the first year of a government's existence. It is worth noting, however, that the means now exist for effecting such a change without the government's support. Backbench business includes motions to change standing orders,³³ and the Backbench Business Committee has already put forward such motions, which the House has passed.³⁴ All that is really required is sufficient political will by members themselves.
58. The Backbench Business Committee is entitled to determine the business of the House on 27 days in each session (SO 14(4)). It may put down for decision any matter that falls

33 Howarth D, *The Backbench Business Committee of the House of Commons* [2011] Public Law 490–98 – changes to the powers of the Backbench Business Committee itself are excepted.

34 *Ibid.*

within the definition of ‘backbench business’ (SO 14(4)). ‘Backbench business’ is defined by SO 14(7) as *any* business *except* for a specific list of matters. That list includes ‘any motion to amend this order or Standing Order No. 152J (Backbench Business Committee)’; but not does not include any other type of amendment to Standing Orders.³⁵ That means that motions to amend Standing Orders other than SO 14 and SO 152J are within the definition of ‘backbench business’, which includes amendments changing the powers of an existing committee or bringing new ones into existence. Standing Orders were in fact amended during time allotted to the Backbench Business Committee on 2 December 2010, when the House changed the powers of the Parliamentary Commissioner for Standards and the powers of the Public Accounts Committee.³⁶

Conclusion

59. This report has set out the current approach to legislation of a constitutional nature within the UK system, and in particular

35 The full list of exceptions is: (a) government business, that is proceedings relating to government bills, financial business, proceedings under any Act of Parliament, or relating to European Union Documents, or any other motion in the name of a Minister of the Crown; (b) opposition business under paragraph (2) above; (c) motions for the adjournment of the House under paragraph (7) of Standing Order No. 9 (Sittings of the House), private Members’ motions for leave to bring in bills under Standing Order No. 23 (Motions for leave to bring in bills and nomination of select committees at commencement of public business) and private Members’ bills under paragraphs (9) to (14) below; (d) proceedings relating to private business; (e) any motion to amend this order or Standing Order No. 152J (Backbench Business Committee); (f) business set down at the direction of, or given precedence by, the Speaker.

36 Hansard, HC Deb Vol 519 cols 995–1017 (2 December 2010) (amending SO 150) and col 1074 (amending SO 148). See Howarth D, *The House of Commons Backbench Business Committee* [2011] Public Law 490–98.

within Parliament. It has identified the deficiencies contained in present practices, particularly when placed in international perspective. The UK constitution is vulnerable to abuse. Governments, driven by partisan considerations, are able to force onto the statute book poorly conceived measures changing the fabric of our constitution, subject only to minimal consultation and limited scrutiny. We have considered a range of different approaches that might ensure constitutional change is more sensitively handled. Finally, the report has set out a modest proposal for change, through a development of the parliamentary committee system. A better way of handling constitutional legislation is already within the grasp of Parliament, if it wants it.

Appendix a

Membership of The Constitution Society expert working party on definition of constitutional legislation, sitting during 2012–13.

Prof. Sir John Baker

Dr. Andrew Blick

Prof. Linda Colley

Prof. David Feldman

Richard Gordon QC

David Howarth

Nat le Roux

(Lord) Robert MacLennan

Appendix b

Constitutional statutes which satisfy Sir John Baker's criteria

- ◆ Scotland Act 2012
- ◆ Public Bodies Act 2011
- ◆ Localism Act 2011
- ◆ Fixed-term Parliaments Act 2011
- ◆ European Union Act 2011
- ◆ Parliamentary Voting System and Constituencies Act 2011
- ◆ Constitutional Reform and Governance Act 2010
- ◆ Parliamentary Standards Act 2009
- ◆ European Union (Amendment) Act 2008
- ◆ Further Education and Training Act 2007
- ◆ Tribunals, Courts and Enforcement Act 2007
- ◆ Northern Ireland (St Andrews Agreement) Act 2006
- ◆ Legislative and Regulatory Reform Act 2006
- ◆ Government of Wales Act 2006
- ◆ Terrorism Act 2006
- ◆ Equality Act 2006
- ◆ Constitutional Reform Act 2005
- ◆ Prevention of Terrorism Act 2005

- ◆ Civil Contingencies Act 2004
- ◆ Scottish Parliament (Constituencies) Act 2004
- ◆ Justice (Northern Ireland) Act 2002?
- ◆ European Communities (Amendment) Act 2002
- ◆ House of Commons (Removal of Clergy Disqualification) Act 2001
- ◆ Regulatory Reform Act 2001
- ◆ Disqualifications Act 2000
- ◆ Freedom of Information Act 2000
- ◆ Local Government Act 2000
- ◆ Terrorism Act 2000
- ◆ House of Lords Act 1999
- ◆ Greater London Authority Act 1999
- ◆ Northern Ireland Act 1998
- ◆ Scotland Act 1998
- ◆ Human Rights Act 1998
- ◆ Government of Wales Act 1998
- ◆ European Communities (Amendment) Act 1998
- ◆ Northern Ireland (Elections) Act 1998
- ◆ Bank of England Act 1998
- ◆ Northern Ireland (Emergency Provisions) Act 1998
- ◆ Greater London Authority (Referendum) Act 1998
- ◆ Referendums (Scotland and Wales) Act 1997
- ◆ Public Order Act 1986
- ◆ Canada Act 1982

- ◆ Supreme Court Act 1981 [now renamed the Senior Courts Act 1981]
- ◆ House of Commons Disqualification Act 1975
- ◆ Northern Ireland Constitution Act 1973
- ◆ European Communities Act 1972
- ◆ Emergency Powers Act 1964
- ◆ Life Peerages Act 1958
- ◆ Ireland Act 1949
- ◆ Crown Proceedings Act 1947
- ◆ Royal Titles Act 1953
- ◆ Regency Acts 1937 – 53
- ◆ Declaration of Abdication Act 1936
- ◆ Statute of Westminster 1931
- ◆ Parliament Acts 1949
- ◆ Parliament Acts 1911
- ◆ Treaty of Union With Ireland Act 1800
- ◆ Act of Union 1707
- ◆ Act of Settlement 1700
- ◆ Crown and Parliament Recognition Act 1689
- ◆ Bill of Rights and Claim of Right 1689

Statutes which do not satisfy Sir John's criteria but which are arguably constitutional

- ◆ Equality Act 2010
- ◆ Political Parties and Elections Act 2009

- ◆ Northern Ireland Act 2009
- ◆ Northern Ireland (St Andrews Agreement) Act 2007
- ◆ Electoral Administration Act 2006
- ◆ Regional Assemblies (Preparations) Act 2003
- ◆ European Parliament (Representation) Act 2003
- ◆ European Parliamentary Elections Act 2002
- ◆ Political Parties, Elections and Referendums Act 2000
- ◆ Representation of the People Act 2000
- ◆ European Parliamentary Elections Act 1999
- ◆ British Nationality Act 1981
- ◆ Ministerial and Other Salaries Act 1975
- ◆ Representation of the People Acts

Distinguishing constitutional legislation

A modest proposal

Andrew Blick, David Howarth and Nat le Roux

In most democratic states, the mechanisms for constitutional change are clearly separated from mechanisms for enacting 'ordinary' legislation. They are also designed to make any significant alteration in existing constitutional arrangements a relatively difficult undertaking. In Britain, however, there is no legislative process for constitutional change other than ordinary legislation, nor is there any clear or generally agreed distinction between constitutional and other laws.

The potential shortcomings of this approach have become increasingly evident in the period since 1997, which has been marked by frequent, sometimes hectic, constitutional change. Constitutional modification is now an established part of every government's legislative programme. If elected governments too often seem to amend these rules in a self-interested way then trust in the legitimacy of the political system may be progressively undermined.

This paper considers the options and proposes a mechanism whereby Parliament could identify and impose the special procedures it deems appropriate for legislation of first-class constitutional importance. It concludes that if Parliament wants to, it has the power to bring about a better approach in this area.



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ISBN:
978-0-9928904-2-1

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